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Case No. 09-53

IN THE UNITED STATES SUPREME COURT

WILLIAM HAROLD KELLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether this Court should exercise its certiorari jurisdiction to review the denial of a claim under Brady v. Maryland, 373 U.S. 83 (1963), where the ruling does not conflict with any other court opinion or address any unsettled question of federal law?

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STATEMENT OF THE CASE AND FACTS

This petition seeks review of an opinion of the Florida Supreme Court denying relief requested pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Petitioner, William Kelley, is currently incarcerated on Florida's death row, sentenced in 1984 following his conviction for first degree murder in the 1966 death of wealthy citrus farmer Charles Von Maxcy. Kelley v. State, 486 So. 2d 578, 579-80 (Fla.), cert. denied, 479 U.S. 871 (1986). This Court has denied certiorari review of this case on two prior occasions: following his direct appeal, when Kelley challenged the Florida Supreme Court's opinion that his due process rights were violated when the State destroyed evidence prior to trial, Kelley v. Florida, 479 U.S. 871 (1986); and again following the Eleventh Circuit Court of Appeals opinion reversing the granting of habeas corpus relief by the United States District Court for the Southern District of Florida, Kelley v. Crosby, 545 U.S. 1149 (2005).

Respondent disagrees with the Statement of the Case included in the certiorari petition as filed, which outlines both the procedural history and the factual background of Kelley's prosecution for the Maxcy murder. Among this recitation are several improper inferences and a few critical omissions, resulting in a Statement biased in Kelley's favor. For example, the Statement suggests that Kelley's trial attorneys were not aware that there was evidence collected from the crime scenes, tested by the Florida Sheriff's Bureau (FSB) in 1966 and 1967, then returned to the submitting agency, the Highlands County Sheriff's Office (HCSO). However, it is

undisputed that Kelley's attorneys had a copy of a transcript from Sweet's trial, which described the evidence that had been collected, outlined the chain of custody for the evidence that was submitted to the FSB and then returned to the HCSO, and identified the specific items of evidence which were admitted against John Sweet at his trial. In addition, this is a matter of routine procedure in Florida investigations, and at least Kelley's local attorney, an experienced criminal defense attorney, would have been familiar with this procedure. Furthermore, one of the witnesses at the postconviction evidentiary hearing testified that the evidence in this case had been returned from the lab after testing to the local sheriff's office.

Also, in the initial state court postconviction proceedings, Kelley's trial attorneys testified that they had investigated the destruction of all of the evidence prior to trial, and had learned that the State had not only destroyed the evidence which had been admitted at Sweet's trial, but had also destroyed the evidence which had been collected from the crime scenes but not admitted against Sweet (which the petition refers to as "non-Sweet crime evidence"). Both of Kelley's trial attorneys are now deceased.

Kelley's Statement of the Case is also written in a confusing manner which, rather than simply stating the facts, offers questionable conclusions and focuses more on what was not asserted in prior litigation. Kelley attempts to portray the State in a bad light, by accusing the State of failing to make arguments previously which the State would have no reason to make. For example, Kelley asserts that, in responding to the claim of evidence destruction in

Kelley's direct appeal, the State "did not advise Kelley or the court that the non-Sweet crime scene evidence had not actually been destroyed pursuant to the 1976 court order because it had instead remained in the possession of the submitted authorities" (Petition, p. 6). However, there is no basis to believe that any of this evidence still existed after the 1976 destruction order. Kelley now claims that this "non-Sweet" evidence existed after 1976 and through the time of his 1984 trial, which is the basis of his claim that the trial court's instruction to the jury that there was no additional evidence to be considered was erroneous. There is, however, absolutely no evidence to support his new personal belief that this evidence existed after the Sweet evidence was destroyed in 1976.

Kelley also takes great liberties with offering facts as to his knowledge about the evidence in his case. For example, he asserts that he filed his 2007 Brady claim for postconviction relief "having finally been told by the State for the first time that much of the crime scene evidence had *not* been included within the materials permitted to be destroyed in 1976 under the court order" (Petition, p. 10-11) (emphasis in original). Apparently Kelley feels that he was "told" the evidence still existed after 1976 by the disclosure of these "evidence disposition forms," which offered no clue as to whether the evidence existed after 1976 but merely memorialized that the evidence was returned from FSB to HCSO in 1966 and 1967. Although the State provided the forms, the State has not "told" Kelley or otherwise taken the position that this non-Sweet evidence still existed after 1976.

For these reasons, Respondent does not agree to the Statement of the Case recited in the Petition, and offers the following factual background, beginning with the facts as noted by the Florida Supreme Court in Kelley's direct appeal:

> Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.
>
> John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.
>
> Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Kelley, 486 So. 2d at 579-580.

Following the reversal of Sweet's conviction, the State's inability to proceed against him resulted in his discharge on speedy trial grounds in 1971. In 1976, the State of Florida petitioned the court and obtained permission to destroy the physical evidence which had been admitted during Sweet's trials. Sweet ultimately returned to Massachusetts and, in 1981, approached authorities there regarding criminal activity taking place in that state. With Sweet's cooperation, Florida officials obtained an indictment against Kelley for Maxcy's murder in December 1981. At that time, Kelley was "on the run" from the law and sought as a fugitive. Kelley was apprehended in Tampa, Florida, on June 16, 1983.

The principal witness against Kelley was John Sweet, who identified Kelley as one of two men that Sweet had hired to kill Maxcy. According to Sweet, the hit men stayed at a hotel in Daytona, and met him at a shopping center in Sebring on the day of the murder. Sweet drove the men to Maxcy's home in their car and dropped them off, telling them the front door was unlocked and Maxcy would be home shortly. He returned their car to the shopping center parking lot, picked up his own car, and drove around for a while until he saw Maxcy's car parked at the shopping center, signaling the mission had been accomplished. A great deal of evidence was presented to corroborate Sweet's testimony as to Maxcy's murder, including bank records, phone records, car rental and hotel records.

A deputy testified that fingerprints were lifted from the crime scene and from Maxcy's car, but that, to his knowledge, the prints were never identified.

Several crime scene photographs were admitted, showing a great deal of blood in the Maxcy house. Investigator Murdock testified, however, that no blood was found in Maxcy's abandoned car, a point emphasized in the defense closing argument.

The jury convicted Kelley and, following a penalty phase, recommended that the death sentence be imposed. Judge Bentley followed the jury's recommendation and imposed a sentence of death on April 2, 1984.

On appeal, Kelley challenged the trial court's refusal to dismiss the case based on the delay and loss of evidence. In a supplemental brief, Kelley asserted the destroyed evidence included, "hair samples, fingernail scrapings, blood samples and scrapings, carpet sections, a brake pedal and floor mat from the victim's car, the victim's clothing, a blood stained sheet alleged to have covered the victim, bullets, and other items." The Florida Supreme Court denied relief and affirmed the conviction and sentence imposed. Kelley, 486 So. 2d at 582, 586.

State postconviction proceedings were initiated when Kelley filed a motion to vacate on November 20, 1987. The motion alleged that crime scene evidence, in addition to that evidence known to have been destroyed pursuant to court order from Sweet's trial, had been destroyed. This claim was rejected as procedurally barred. Another claim, asserting that Kelley's trial attorneys provided ineffective assistance of counsel by failing to adequately investigate the destruction of the evidence, was litigated at an evidentiary hearing in July, 1988.

Kelley alleged that counsel were deficient regarding the destruction of evidence admitted at Sweet's trials, as well as other evidence collected during the investigation.

The motion to vacate offered sworn affidavits from both of Kelley's trial attorneys, specifically stating: "In preparing for the trial of William Kelley, it became clear at some point that evidence from the Sweet trial as well as the fruits of the police investigation in the case had been destroyed." These affidavits were admitted as substantive evidence during the postconviction hearing.

The postconviction motion was denied, a ruling which was affirmed on appeal. Kelley v. State, 569 So. 2d 754 (Fla. 1990). Judge Bentley's extensive factual findings were adopted and incorporated into the appellate opinion, which addressed the destruction of crime scene evidence claim as follows:

> Kelley first argues that the state's destruction of material evidence prior to his trial deprived him of his constitutional rights. In the prior appeal, this Court explained that because the case involving Maxcy's death had been closed for many years, the state obtained an order permitting the destruction of evidence. Several years later, the state initiated the prosecution of Kelley when new evidence came to light. This Court concluded that the state had not been negligent in causing the destruction of evidence and further held that the destruction of the evidence in question did not prejudice Kelley's case.

> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley. Further, in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed. The state was not at fault in the destruction of the evidence. Kelley, 486 So.2d at 581. The destruction of evidence in this case did not deprive Kelley of due process of law. See Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process).

Kelley, 569 So. 2d at 756. The Florida Supreme Court also denied a petition for writ of habeas corpus, which alleged that Kelley's appellate attorneys had rendered ineffective assistance in his direct appeal. Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992).

Kelley then filed a federal petition for writ of habeas corpus in the United States District Court, Southern District of Florida, asserting six issues, including a challenge to the destruction of all of the physical evidence - that admitted at Sweet's trial as well as other fruits of the police investigation. The

district court issued an Order granting habeas relief pursuant to Brady v. Maryland, 373 U.S. 83 (1963), on September 19, 2001, followed by an Order of December 30, 2001, finding that Kelley's trial attorneys provided ineffective assistance of counsel. Kelley v. Singletary, 238 F. Supp. 2d 1325 (S.D. Fla. 2002). The Dec. 30 Order also denied Kelley's claim on the destruction of evidence. Id., at 1329-31.

On appeal, the Eleventh Circuit rendered an extensive opinion reversing the grant of habeas relief, and reinstating Kelley's conviction and sentence. Kelley v. Secretary of the Department of Corrections, 377 F.3d 1317 (11th Cir. 2004). The Eleventh Circuit characterized the district court as "naive," [377 F.3d at 1340], flawed by a "hasty assumption," [377 F.3d at 1341], and "odd," [377 F.3d at 1347, n.30], finding it "obvious" that the district court was confused on the facts [377 F.3d at 1359], finding the district court's conclusion on one issue "strains credulity," "is preposterous," and contrary to the record before the district court [377 F.3d at 1359]. The Eleventh Circuit concluded that the district court committed clear error on a number of levels: by conducting a second evidentiary hearing in federal court; by granting relief on a procedurally barred claim which had never been exhausted in state court (and expressing "serious skepticism" as to whether relief could have been granted on the merits, even if the claim had been properly exhausted, see 377 F.3d at 1351); and by granting relief on a Brady claim which should have been rejected on its merits, as it had been in state court. Kelley, 377 F.3d at 1340, 1343, 1354, 1369. Kelley sought certiorari review in this Court, which was denied on June 27, 2005.

Kelley v. Crosby, 545 U.S. 1149 (2005).

Kelley filed a successive state habeas petition in the Florida Supreme Court in October, 2003, presenting a claim for relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). The petition was denied on May 4, 2004. Kelley v. Crosby, 874 So. 2d 1192 (Fla. 2004).

Thereafter, Kelley filed a motion seeking postconviction DNA testing on twenty-nine items of evidence which had been collected during the investigation, but not admitted at Sweet's trial. The circuit court denied the motion following an evidentiary hearing, specifically finding that the evidence sought to be tested no longer existed. The Florida Supreme Court's opinion affirming the denial of Kelley's DNA motion set forth the testimony presented at the evidentiary hearing:

> At the evidentiary hearing on June 6, 2006, ten witnesses testified. The first nine testified regarding their efforts to locate the evidence Kelley was seeking. These witnesses, after diligent searches, were unable to locate any of the requested items. First, Tina Barber, records custodian for the Highlands County Sheriff's Office, was unable to find any evidence in her office relating to Kelley's case. She found only a letter stating that older receipts were turned over to the attorneys in Bartow. Cecilia High, supervisor of property and evidence at the Highlands County Sheriff's Office, searched the property storage facility but could not find anything. Dr. Marta Coburn, chief medical examiner for Collier

County, found nothing. Sheli Wilson, the District 10 medical examiner's office manager, and her staff searched but found nothing related to Von Maxcy's death. Suzanne Livingston, forensic services director for the Florida Department of Law Enforcement (FDLE), found four disposition forms in the case files indicating that the evidence had been returned to the submitting agency, the Highlands County Sheriff's Office, but found none of the requested evidence. Judy Bachman, Director of Criminal Court Services for the Highlands County Clerk of Courts, found evidence relating to Kelley's case, including a sealed envelope containing poster boards, photos, hotel receipts, and paper evidence introduced as exhibits in Kelley's first trial. She also found an order releasing some evidence in a related case, but she found none of the items requested. John King, special agent supervisor for the FDLE Sebring office, searched inventory and files but found nothing. Terry Wolfe, Tenth Judicial Circuit State Attorney investigator, searched both the Sebring and Bartow evidence lockers and found nothing. Sebring Assistant State Attorney Steve Houchin retrieved the boxes of case files for this case from the Sebring file room and delivered them to Wolfe to deliver to Assistant State Attorney Victoria Avalon, who represented the State in this proceeding. Houchin confirmed that there were no other files from this case in the file room. He noted that the state attorney does not keep items of

> evidence; items that are not admitted at trial are retained by the local investigating agency.
>
> The final witness was Dr. Martin Tracey, professor of biological studies at Florida International University. He testified as Kelley's expert witness in the area of population genetics. Dr. Tracey discussed the ability of DNA testing to identify an individual to nearly a one hundred percent degree of certainty.

Kelley v. State, 974 So. 2d 1047, 1048-50 (Fla. 2007).

Suzanne Livingston testified at the hearing that, in investigating the request for DNA testing, she located the case files and found disposition forms indicating that the evidence had been returned to the submitting agency, the Highlands County Sheriff's Office. She noted that the Florida Sheriff's Bureau was the predecessor to FDLE and that the policy in 1966, as it still is today, was to not retain any evidence but return everything to the submitting agency once their lab analysis was complete.

While the DNA appeal was pending in the Florida Supreme Court, Kelley's attorneys filed a successive postconviction motion which claimed that the FSB disposition forms had been withheld from the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963). The court summarily denied the successive motion, finding it "unlikely" that Kelley's trial attorneys were not aware of the information on the evidence disposition forms (Pet. App. 8a-9a), and finding that the information on the forms was "not exculpatory or impeaching in any way," (Pet. App. 9a). Most significant for Kelley's current petition, the court also

observed that "there is no reasonable probability that there would have been a different result at trial if the evidence disposition forms had been available for trial preparation or if the forms had been introduced at trial," noting "there is no reasonable probability that the forms would have led to the discovery of the actual crime scene evidence, which was destroyed prior to trial" (Pet. App. 9a).

On appeal, the Florida Supreme Court affirmed this ruling, specifically reiterating "the record demonstrates that the evidence disposition forms at issue are neither favorable nor material" (Pet. App. 17a); Kelley v. State, 3 So. 3d 970, 973 (Fla. 2009). The court held that there was no reasonable probability of a different result had the forms been disclosed, and that the court's confidence in the outcome was not undermined (Pet. App. 17a-18a). In addition, the court noted its findings from the earlier DNA appeal, that evidence had been destroyed in 1976 and could not be located, despite a diligent search, concluding, "we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search" (Pet. App. 18a). The court also denied another state habeas petition, which disputed the court's prior findings that this evidence had been destroyed before Kelley's trial, finding the claim presented to be procedurally barred (Pet. App. 18a-19a).

This petition seeks review of that opinion.

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT'S CORRECT, FACT-SPECIFIC DENIAL OF RELIEF UNDER BRADY V. MARYLAND DOES NOT WARRANT EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION

Kelley asserts that this Court must exercise certiorari review in this case to resolve a split among circuit courts as to whether Brady v. Maryland, 373 U.S. 83 (1963), requires the suppressed evidence to be material and exculpatory or whether a Brady violation occurs when the evidence is not material or exculpatory but the defendant speculates, without any substantiation, that the suppressed information could lead to material, exculpatory evidence. Review must be denied for a number of reasons; as will be seen: (1) the opinion below did not conflict with any opinions from this Court; (2) the court below did not consider or analyze Kelley's current claims regarding circuit conflicts and the alleged circuit conflicts cited are not implicated in this case; and (3) the court below properly denied Kelley's fact-specific claim.

Kelley asserts initially that the Florida Supreme Court's denial of relief conflicts with Brady itself, with Kyles v. Whitley, 514 U.S. 419 (1995), with United States v. Bagley, 473 U.S. 667, 682 (1985), and with Wood v. Bartholomew, 516 U.S. 1 (1995), by applying a "narrow" construction of the Brady materiality standard; according to Kelley, the Florida Supreme Court rejected his claim of materiality based only on the finding that the forms themselves were not exculpatory or material, and refused to

consider or analyze Kelley's claim that the forms may have led to the discovery of the original crime scene evidence, including hair and fingernail scrapings. Kelley concludes that the court below erred in applying Brady: "the court should have determined (i) whether the evidence forms would have led Kelley's counsel to locate the non-Sweet trial evidence identified by the forms and (ii) what the effect of that evidence would have been on the jury" (Petition, pp. 18-19).

The first flaw in Kelley's plea for review is that the Florida Supreme Court did exactly what Kelley claims it should have done. The Court specifically considered whether the evidence disposition forms could have led to the discovery of any crime scene evidence and held, "we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search." Kelley, 3 So. 3d at 973; Pet. App. 18a. Clearly, as the opinion expressly indicates, the Florida court did not limit its analysis to the value of the forms themselves, but considered the effect that disclosure of the forms might have had on preparation of the defense.

There is no language in the opinion below which supports Kelley's claim that the court limited consideration of the alleged Brady forms to a "narrow" view of whether those particular documents alone could change the outcome of the trial proceedings. The court cited the correct standard, quoting Bagley and Strickler v. Greene, 527 U.S. 263 (1999). The court specifically observed that its

confidence in the outcome had not been undermined, and that there was no reasonable probability of a different result, had the forms been disclosed prior to trial.

To the extent that Kelley asserts that the decision below conflicts with Kyles because the Florida Supreme Court did not expressly consider the cumulative effect of other alleged Brady violations asserted in prior proceedings, no conflict exists because Kelley never requested that such an analysis be conducted. See Initial Brief of Appellant, Kelley v. State, Case No. SC08-608 (Resp. App. 1). In addition, no such analysis is necessary since the court found that the information was not exculpatory, and the trial court had found it was "unlikely" that Kelley's trial attorneys did not know this information prior to trial. No conflict with Brady or any other case from this Court can be discerned in the opinion below.

In asserting that certiorari review is necessary, Kelley submits that there is conflict between the federal circuits as to whether Brady is satisfied with a "narrow" review considering only the actual documents or materials that were not disclosed, or whether it requires a "broader" review which also considers the impact which disclosure of the documents or materials might have had on the defendant's ability to prepare for trial. He cites cases from the Second, Sixth, Seventh and Ninth Circuits, which "unambiguously take a broader view of the materiality inquiry" and, according to Kelley, thereby conflict with the opinion rendered below (Petition, p. 19). However, as explained above, the Florida Supreme Court also took the broader view,

specifically finding that the evidence forms could not have led to the discovery of crime scene evidence, since that evidence had been destroyed in 1976. Kelley does not cite any other cases which he claims take the impermissible narrow view, so if there is indeed conflict on this point, it is not demonstrated by Kelley's petition; the decision below does not conflict with any of the cases noted in the petition on this point.

Kelley also asserts that there is a related conflict, "that a ruling in this case would almost certainly resolve" regarding whether a viable Brady claim can be brought if the evidence alleged to have been withheld is itself inadmissible (Petition, p. 20). While the First Circuit appears to have recognized such a conflict in Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (en banc), again any possible conflict is not implicated on the facts of this case.[1] Kelley suggests that the Florida Supreme Court determined that the evidence disposition forms in this case were not admissible, and therefore concluded, without

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[1] Kelley and the Ellsworth court identify a Fourth Circuit case, Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996), as a case which holds that Brady is not implicated by the failure to disclose evidence which is inadmissible. Hoke reversed a district court's decision to grant habeas relief under Brady; the court commented, in a footnote, that if the undisclosed statements were inadmissible, they may be "immaterial" under Brady, citing Wood v. Bartholomew. Id., at 1356. However, for purposes of its opinion, the court assumed that the statements would be admissible and it did not reject Brady on that basis. Whether Hoke or any other case conflicts with Wood is not relevant to Kelley's petition, since the Florida Supreme Court below did not offer any misunderstanding of Wood or any other case.

further analysis, that they could not be deemed to be exculpatory or material. While admissibility is often a factor strongly associated with materiality, the Florida Supreme Court did not make any finding as to the admissibility of these forms in denying relief. The trial court had, in fact, concluded that there was no reasonable probability of a different result "if the evidence disposition forms had been available for trial preparation or if the forms had been introduced at trial" (Pet. App. 9a). Moreover, it is clear from other cases that the Florida Supreme Court does not feel constrained to limit Brady's application to only admissible evidence. See Mordenti v. State, 894 So. 2d 161, 173 (Fla. 2004) (granting a new trial under Brady where State failed to disclose information; "even if inadmissible it was, at a minimum, at least relevant information that would have led the defense to discover evidence for the impeachment of Gail;" concluding that, by withholding information, "the State precluded Mordenti from defending himself fully and fairly").

Since neither of the Florida state courts characterized the evidence forms in this case as inadmissible or limited the consideration of materiality to the question of admissibility, any split among the circuit courts as to whether a Brady claim may be premised on the failure to disclose documents which are not themselves admissible is not implicated in this case. To the extent that such a split exists, it would clearly not be resolved in a case where the challenged legal principle was not even noted or applied.

Despite Kelley's attempt to portray it differently, the Florida Supreme Court rejected Brady in this case after due consideration of all potential implications. The court below did not conclude that the evidence disposition forms were inadmissible and therefore no possible Brady claim could be brought; it instead analyzed the "withheld" documents at face value, and considered whether the forms could have led to the discovery of any other evidence, finding that they could not. Although Kelley now disputes the state courts' finding that even the non-Sweet evidence was destroyed years before his trial, he has no evidence contrary to this finding, which is clearly supported by the extensive record.

Finally, certiorari review should be denied in this case because the Florida Supreme Court applied the correct standard and reached the correct result. Even presuming that the hair, fingernail scrapings, and bloody carpet sample were still available to be found and used in his trial, no different outcome is possible, let alone probable. Kelley asserts that the jury would have rejected John Sweet's testimony if the defense could establish that the scene was very bloody while the car driven from the victim's home after the murder had no blood, but the jury was well aware that these were the facts; the defense made this same argument, supported by the testimony, during the trial. In addition, Kelley puts much on the court's instruction to the jury that there was no "more" or "clearer" evidence, but he has failed to demonstrate that any such evidence existed in 1984.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review: review is to be granted only for compelling reasons, such as when a decision conflicts with another opinion on an important legal principle or addresses an unsettled question of federal law. Kelley has clearly failed to demonstrate that any such compelling reasons exist for the granting of certiorari review in this case. Therefore, this Court must deny his pending petition for writ of certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY
Appellant,

v.

CASE NO.: SCO8-608
L.T. NO.: CR81-0535

STATE OF FLORIDA,
Appellee.
_____/

INITIAL BRIEF OF APPELLANT WILLIAM HAROLD KELLEY

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PRELIMINARY STATEMENT

Appellant, William Harold Kelley, will be referred to as "Kelley." Appellee, the State of Florida, will be referred to as "the State."

The record on appeal is contained in three (3) volumes. Citations to the record are referred to as "Rx y-z," where "x" is the volume number and "y-z" are the page number(s) . Many of the record citations in this brief will be to the Joint Pretrial Stipulation of Facts filed by Kelley and the State in the federal habeas corpus proceeding. That Stipulation is found in this record at R2 263-79, and it in turn contains references back to the original state court records, as necessary.

As was the convention used by Kelley, the State, and the trial court below, references to Kelley's first trial transcript will be cited as "Kelley I [page number]," references to Kelley's second trial transcript will be cited as "Kelley II [page number]," references to the June 6, 2006 hearing in the Rule 3.853 DNA proceeding will be cited as "Kelley DNA [page number]," and references to the Record on Appeal in the Rule 3.853 DNA proceeding will be cited as "Kelley DNA ROA[volume] [page number]."

All emphasis in quotations has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

INTRODUCTION

William Kelley was indicted in 1981 and convicted in 1984 for the murder of Charles Von Maxcy in 1966. He has steadfastly maintained his innocence. One person who admitted to masterminding the murder, and another who admitted to participating in the murder, were granted immunity. In contrast, Kelley has spent nearly twenty-five years on Death Row. This case has reached this Court four prior times. See Kelley v. State, 974 So. 2d 1047 (Fla. 2007); Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992); Kelley v. State, 569 So. 2d 754 (Fla. 1990); Kelley v. State, 486 So. 2d 578 (Fla. 1986).

In 1976, on motion by the State made five years before Kelley was indicted, some of the physical crime scene evidence collected by the State during its 1966 investigation was destroyed pursuant to court order. [R2 305]. Although other physical evidence gathered during that investigation had been returned to other authorities, that fact was not made known to Kelley at that time. Consequently, his trial proceeded under the mistaken assumption that all of the physical evidence had been destroyed.

It was not until two years ago that the State for the first time advised Kelley, by letter dated May 10, 2006, that some of the crime scene evidence had been returned to four officers of the submitting authorities, who acknowledged receipt of the evidence. [R1 56, 63-67]. It is undisputed that the 1976 court order only authorized evidence held by the clerk of the court in the case of State of Florida v. John J. Sweet, Case No. 3002 (Fla. 10th Cir.) to be

destroyed and it did not authorize the destruction of this other crime scene evidence. [See R3 305-08]. Consequently, there is no reason to believe this evidence was destroyed when other evidence was destroyed in 1976 pursuant to that order.

To the contrary, under the presumption of regularity of business practices, which has been applied to public officials, that evidence is presumed to have existed at the time of Kelley's trial. The State has been inconsistent in its explanation as to what happened to that other evidence, saying at one point that the evidence was not accounted for, [R2 276 ¶98], but now saying it was "destroyed" prior to Kelley's 1984 trial. [R2 195]. The State has never explained, however, why, how, or exactly when the other evidence was purportedly destroyed. What is certain is that Kelley was not given information (i) about its return to investigating agencies in 1966 and 1967 or (ii) that it existed prior to his 1984 trial.

On May 9, 2007, Kelley filed a Florida Rule of Criminal Procedure 3.851(e) (2) motion contending that the State's failure to disclose any information about the existence of this evidence prior to his 1984 trial violated Brady v. Maryland, 373 U.S. 83 (1963) and otherwise constituted prosecutorial misconduct that violated his due process rights, warranting reversal of his conviction and vacation of his sentence. [R1 1-180]. The trial court summarily denied that motion, even though Kelley asserted that the motion required an evidentiary hearing. [R3 403-10]. This appeal followed. [R3 381-82].

A. The Death Of Charles Von Maxcy

The circumstances underlying this case began with an affair between John J. Sweet ("Sweet"), a career criminal, and Irene Maxcy ("Mrs. Maxcy"), the wife of Charles Von Maxcy. See Kelley v. State, 486 So. 2d at 579. The plan was that Sweet and Mrs. Maxcy would live on Mr. Maxcy's inheritance. Id. Sweet reached out to his contacts in Boston and negotiated a contract on Mr. Maxcy's life. Id. Mr. Maxcy was found murdered on October 3, 1966, when Mrs. Maxcy and a relative entered the Maxcy residence and found Mr. Maxcy dead on the bedroom floor. [Kelley II 461].

The police examined the crime scene, took several photographs, and collected physical evidence found at the scene. [Kelley II 478-484]. J.C. Murdock, a Deputy Sheriff at the time, participated in the immediate investigation of the crime scene. [Kelley II 477-478]. According to Deputy Murdock, a significant amount of blood was found in the bedroom and the hallway leading into the bedroom. [Kelley II 479, 493-494]. Deputy Murdock also testified, however, that no blood whatever was found in Mr. Maxcy's car (which the killers allegedly took after the crime), [Kelley II 496-497), despite the absence of any evidence that the killer(s) had washed off blood before leaving Maxcy's house. [Kelley II 496].

Deputy Murdock further testified that investigators located Mr. Maxcy's car in a shopping center parking lot and examined it for evidence. [Kelley II 488]. Investigators found latent fingerprints inside the home and the car; the

fingerprints do not match to Kelley and were never identified. [Kelley II 488, 490, 492].

The physical crime scene evidence was collected and placed in the custody of the Highlands County Sheriff's Office. [Kelley II 479-481, 484, 495, 707]. Some of the physical evidence was later delivered to a laboratory in Tallahassee, Florida, for further analysis. Id.

"Because prosecutors found the evidence insufficient to proceed against [Kelley] and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried." Kelley v. State, 486 So. 2d 578, 579 (Fla. 1986).

B. Proceedings Against Sweet For The Crime

Sweet was tried twice for the first degree murder of Mr. Maxcy. Id. Sweet's first trial ended in a mistrial and his second trial ended in a conviction, which was then reversed on appeal. Id.; see Sweet v. State, 235 So. 2d 40 (Fla. 2d DCA 1970). "At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony." Kelley v. State, 486 So. 2d at 579. The loss of witness testimony was the result of Mrs. Maxcy's conviction for perjury during Sweet's trial. See Wells v. State, 270 So. 2d 399, 403 (Fla. 3d DCA 1972) (affirming Irene Maxcy's conviction for perjury based upon false statements made during the Sweet trial).

C. The Authorized Destruction Of Some Evidence In 1976

In April 1976, the State Attorney for Highlands County filed a "Petition for the Disposal of Evidence," requesting that the trial court authorize the destruction of certain specified evidence and exhibits from Sweet's trials that were then in the custody of the Clerk of Court. [R2 305]. On April 30, 1976, the Court granted the petition and ordered that the specified evidence be destroyed. [See R2 305-08)

That evidence consisted of a small amount of physical evidence recovered from the crime scene and a number of original documentary exhibits, including: (1) a bloody sheet with several rips in it; (2) a section of Mr. Maxcy's shirt; (3) a bullet recovered from the crime scene; (4) a tire belonging to Mr. Maxcy's car that had been slashed several weeks before the murder; (5) car rental agreements; (6) motel records; (7) telephone records; and (8) bank records. [R2 276 ¶96]. It is undisputed that the destruction Order did not encompass any of the other fruits of the prosecution's investigation that were not used in Sweet's trials. It is also undisputed that the Clerk would not have maintained any evidence that was not used in Sweet's trials, so an accidental destruction at that time as part of that Order would have been impossible. [See Kelley DNA 291]

D. Proceedings Against Kelley For The Crime

In 1981, nearly fifteen years after the murder, Sweet entered into negotiations with Massachusetts authorities to obtain immunity for a number of criminal activities he had been involved with there. [R2 263-64 ¶¶1-5]. Sweet in fact received immunity

in Massachusetts for breaking and entering, hijacking, larceny, arson, bribery, bookmaking, counterfeiting, and drug and prostitution offenses. [R2 264 ¶71 . Sweet also received immunity in Florida for the Maxcy case and for perjury committed in his two trials. [R2 264 ¶7]. After receiving immunity, it was Sweet's testimony that was central to Kelley's indictment and prosecution. Kelley v. State, 486 So. 2d at 580.

Kelley's initial trial in January 1984 resulted in a hung jury, from which the court declared a mistrial. [R2 271 ¶9]; Id. at 580. In the second trial, the jury was again impassed until the court gave a non-standard deadlock instruction, which highlighted that there was no other evidence that could be introduced in any future re-trial; according to the instruction, the jury had all the evidence that existed. Id. at 584. After receiving that instruction, the jury found Kelley guilty of first degree murder. In the penalty phase, the jury recommended 8-3 that he receive the death penalty. [Kelley II 985]; Kelley v. Singletary, 222 F. Supp. 2d 1357, 1360 (S.D. Fla. 2002). On April 2, 1984, Kelley was sentenced to death. [Kelley II 1007]; Kelley v. Singletary, 222 F. Supp. 2d at 1360.

As this Court recognized, this was a highly unusual case raising unusual issues. Kelley v. State, 486 So. 2d at 579. The prosecution of Kelley's case was based largely on Sweet's testimony. Kelley v. State, 486 So. 2d at 580; Kelley v. Singletary, 222 F. Supp. 2d at 1359.

The prosecution argued that, according to Sweet's story, the murder was carried out by two men who

drove to the Maxcy residence with Sweet, went into the house, and waited for Mr. Maxcy to arrive home from work. [Kelley II 435, 546, 862, 890] Significantly, the prosecution presented no other theory as to how the crime occurred or the number of persons involved. Id.

The lawyers representing Kelley during his trials chose not to present evidence in his defense and, instead, rested without presenting a case-in-chief. [Kelley II 813]. In deciding how to defend, they were hamstrung by a lack of physical evidence to present about the crime scene and related events. While mention was made of the bloody crime scene and the lack of blood evidence connecting Kelley to the crime scene, the defense was unable to develop this theme with physical evidence and a full crime scene reconstruction. [See Kelley II 825, 833].

In closing argument, Kelley's lawyers argued that Sweet was an admitted liar and was lying about Kelley's involvement in the crime. [Kelley II 818, 840, 844-847]. The defense argued that Sweet named Kelley as a participant in the crime because everyone else who was allegedly involved was dead or missing by 1981, and Sweet accordingly had no one else to offer up to the prosecution to secure his immunity from prosecution in Florida. [Kelley II 842]. But, since the existence of the physical evidence was not disclosed to Kelley by the prosecutors, the defense was unable to present physical evidence to bolster its argument that Sweet was lying and that Kelley was not at the murder scene.

After retiring to deliberate, the jury reached an impasse. After giving the standard deadlock

instruction, the trial judge gave the following additional and non-standard instructions:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.

See Kelley v. State, 486 So. 2d at 584.

The State stayed silent when this jury charge was read. In fact, the State knew there was more evidence - from the crime scene itself - that had not been disclosed to Kelley or his counsel. That evidence was presumed to still exist, since the only destruction order did not encompass this other evidence.

E. Kelley's Direct Appeal

On direct appeal, Kelley contended, among other things, that giving the non-standard deadlock language -- after the jury had deliberated for several hours and announced that it had reached an impasse -- impermissibly misled and so coerced the jury into returning a verdict that it deprived Kelley of his right to a fair trial. See Kelley v. State, 486 So. 2d at 584. This Court, however, concluded that, "while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given." Id. at 85.

Kelley also contended on direct appeal that the State's destruction of evidence held by the Clerk of Court over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. See Kelley v. State, 486 So. 2d at 580. This Court described how, after Sweet's trial, the case file, including the evidence, had been transmitted to the clerk and then destroyed nine years later on the State's motion. This Court then stated:

> The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment.

Id. at 580.

That list of items in this Court's opinion refers to the evidence at Sweet's trial that was destroyed with specific authorization of the trial court. It does not make any reference to the other fruits of the prosecution's crime scene investigation. Although Kelley and the Court did not know it at the time, that other evidence had been returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to four officers of the submitting authorities. [Rl 56, 63-67]. The whereabouts of that evidence before the 1984 trial remains unknown to Kelley today, because the trial court below denied Kelley's Rule 3.851(e) (2) Motion, leading to this appeal. (See Section G, below). What is known is the destruction order did not reach that evidence and the State has come forward with no evidence suggesting it was destroyed as of 1984. Thus, as discussed at page thirty-two (32) below, that evidence is presumed under Florida law to have existed at the time of Kelley's trial.

F. Post-Conviction Proceedings

1. Kelley's Rule 3.850 Motion

On November 20, 1987, Kelley filed a motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. After denying portions of the motion on May 27, 1988, the trial court held a hearing on July 18-19, 1988, and then denied the remainder of the motion. This Court affirmed. See Kelley v. State, 569 So. 2d 754 (Fla. 1990)

Among the issues addressed by this Court was whether the State's destruction of material evidence

prior to Kelley's trial deprived him of his constitutional rights. This Court ruled that its prior opinion on direct appeal resolved this issue, *sub silentio*:

> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley.

Kelley v. State, 569 So. 2d at 756.

The Court also noted that "in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed." Id. We now know, however, that those affidavits were based on incomplete information, due to the failure of the State to disclose to Kelley that the fruits of the prosecution's investigation that were not used at Sweet's trial had been returned to the submitting authorities.

The record shows there never has been an evidentiary finding that such evidence was in fact destroyed prior to Kelley's trial. Nor would the record before this Court on direct appeal and in the post-conviction proceedings have supported a finding that all evidence had been destroyed. Presumably, it had not been destroyed, as no court order authorized such

destruction, and the State never has come forward with any state official who could attest that this evidence was in fact destroyed after being returned to the submitting authorities and before Kelley's trial. Obviously, information about the existence and whereabouts of this evidence was solely and peculiarly within the State's own knowledge.

In the 1990 appeal, Kelley also raised a Brady claim, but it was entirely different from the suppression of evidence at issue in the current appeal. The Brady claim in the 1990 appeal involved several specific items of evidence: (i) a transcript of the first Sweet murder trial; (ii) a latent fingerprint report; (iii) a 1967 police report showing that Kaye Carter could not positively identify Kelley; (iv) crime scene photographs; (v) the fact that Sweet received immunity in Massachusetts for his cooperation in the Maxcy case; and (vi) the agreement with Sweet that precluded Roma Trulock from testifying at Kelley's trial. Kelley v. State, 569 So. 2d at 757-58.

None of that evidence is part of the May 10, 2006 letter informing Kelley that much crime scene evidence still existed in 1966 and 1967 that was not disclosed to Kelley before trial. Its whereabouts at the time of Kelley's trial has never been explained by the State. All information about this additional evidence was kept from Kelley prior to his 1984 trial.

2. Kelley's State Habeas Petition

On April 8, 1991, Kelley filed a petition for habeas corpus relief in the Florida Supreme Court. Kelley's petition was denied on March 12, 1992. See Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992). None of the issues related to evidence, or destroyed evidence.

3. Kelley's Federal Habeas Petition

On October 9, 1992, Kelley petitioned the United States District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus. Kelley v. Singletary, 222 F. Supp. 2d at 1361. Among the six claims raised by Kelley was a Brady claim that tracked the Brady claims raised in Kelley's Rule 3.850 motion in state court. As noted above, those Brady claims are different from the claim at issue in this motion.

On August 31, 2000, the District Court denied some of Kelley's claims on the basis of the record from Kelley's trial. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1331 (11th Cir. 2004). On November 22, 2000, the federal court held a series of evidentiary hearings. Id. Following these hearings, on September 19, 2002 the court granted Kelley federal habeas relief, reversing his conviction and ordering a new trial, based on a finding of significant Brady violations. Kelley v. Singletary, 222 F. Supp. 2d at 1366, 1367. On December 30, 2002, the court again granted Kelley federal habeas relief based on a separate finding of ineffective assistance of trial counsel. Kelley v. Singletary, 238 F. Supp. 2d 1325, 1329 (S.D. Fla. 2002).

In granting Kelley habeas relief based on newly discovered evidence, Judge Roettger stated that "[t]his case presents many incidences of prosecutorial misconduct. Hardy Pickard, Assistant State Attorney, has a habit of failing to turn over exculpatory and impeachment evidence." Kelley, 222 F. Supp. 2d at 1363. Judge Roettger further noted that "[i]n another capital murder case, Circuit Judge

Barbara Fleischer, sitting by designation by the Florida Supreme Court as a temporary judge of the Tenth Circuit, ordered a new trial for a defendant because Assistant State Attorney Hardy Pickard withheld impeachment materials from the defense. State of Florida v. Melendez, No: CF-84-1016A2-XX (Tenth Judicial Circuit of Florida), slip op., filed December 5, 2001." Id. at 1363 n.3. Melendez was a 2001 Order setting aside a 1984 conviction.

More specifically, Judge Roettger found that Pickard had withheld several items from Kelley. These included information regarding Sweet's immunity deal; the transcript of Sweet's first trial; a police report in which a witness gave an inaccurate description of Kelley and was unable to positively identify him; and a fingerprint report that found Kelley's fingerprints did not match any of those lifted from Maxcy's house and car. Id. at 1364-66. Judge Roettger deemed all of this evidence to be material and exculpatory.

The State appealed the habeas relief to the Eleventh Circuit Court of Appeals, which reversed on July 23, 2004 and reinstated the conviction. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1333, 1369. The Eleventh Circuit did not disagree that Pickard had wrongly withheld evidence. Instead, it held that Judge Roettger applied the wrong legal standard in granting an evidentiary hearing and that, in any event, the non-disclosed items could not have affected the outcome of the trial. Id. at 1333, 1340-43, 1369. Thus, Judge Roettger's findings of prosecutorial misconduct never were themselves specifically negated, only his findings that they could have affected the trial.

4. **Kelley's Motion For DNA Testing**

On January 17, 2006, Kelley petitioned, pursuant to Florida Rule of Criminal Procedure 3.853, for post-conviction DNA testing of physical evidence collected by law enforcement. That motion affirmatively requested, among other things, pre-hearing discovery to locate the DNA evidence that should be tested.

In his motion, Kelley acknowledged that, according to the State, certain physical evidence gathered from the crime scene had been destroyed pursuant to a court order nearly a decade before he was convicted. It was clear from the face of Kelley's motion that the evidence destroyed under the court order was not the subject of his request for postconviction DNA testing. [See Kelley DNA ROA1 13-18]. Although Kelley and his defense attorneys had been left by the State to incorrectly assume at trial and in post-conviction proceedings that all fruits of the prosecution's investigation had been destroyed, the factual record in his case contained no finding by the court that the other items of physical evidence collected from the crime scene, but not a part of the Sweet trial, had been destroyed at the time of Kelley's trial (or ever). This motion sought to determine if all such evidence had in fact been destroyed, even though that was not authorized by the only destruction Order.

In preparing for a hearing on this motion, Kelley received the correspondence dated May 10, 2006 from Assistant State Attorney Victoria Avalon that now disclosed that, in fact, over thirty pieces of physical evidence were returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to four

different officers of the submitting authorities. [R1 56, 63- 67]. The State had never previously disclosed the existence or whereabouts of the physical evidence.[2]

Kelley's Motion for DNA Testing was denied on June 29, 2006. Kelley appealed that ruling to this Court. On October 25, 2007, this Court affirmed the lower court's order. Kelley v. State, 974 So. 2d 1047 (Fla. 2007).

G. The Current Action: Kelley' s 3.851(e) (2) Motion

On May 9, 2007, pursuant to Florida Rule of Criminal Procedure 3.851(e) (2), Kelley requested the trial court to reverse his conviction and vacate his death sentence based on the State's violation of Brady v. Maryland, 373 U.S. 83 (1963) and Florida Rule of Criminal Procedure 3.220, which requires a duty of disclosure on the part of the State to provide material information in its possession to the defendant. [R1 1-180) . It is the summary denial of that Motion that led to this appeal. [See R3 403-10)

Kelley's Motion was based on an extraordinary turn of events in this case. The entire history of this case has proceeded on the defendant's and the courts' core assumption that all of the fruits of the prosecution's investigation of the 1966 crime scene were destroyed. The State's May 10, 2006 disclosures -- which attached receipts of public officials for the returned evidence -- destroyed that assumption. [See R1 56, 63-67].

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[2] Kelley's Brady v. Maryland, 373 U.S. 83 (1963), claim addressed in this appeal was triggered as of May 10, 2006, after Kelley's DNA motion had already been filed.

The May 10, 2006 letter was the first time in the history of this case that Kelley or his lawyers --- or any court -- learned that over thirty pieces of physical evidence were returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to R. Trulock, Robert E. McCory, Don Bragg, and Broward Coker, officers of the submitting authorities.[3] The order authorizing destruction of evidence related solely to evidence used at Sweet's trial and that was in the hands of the circuit court clerk. The May 10, 2006 letter relates to evidence in the hands of other individuals that was not used as evidence at Sweet's trial.

Because the return of the evidence to these individuals had never before been revealed by the State, Kelley was deprived of the opportunity prior to his trial to determine what those four persons did with the physical evidence that was returned to them. Instead, Kelley and his lawyers always have been allowed by the State to assume that all of the evidence from the 1966 investigation was destroyed, and to proceed before the courts based on that premise. That mistaken premise directly affected the way the trial was defended, the way a deadlocked jury was charged by the trial court with a non-standard deadlock charge, and the way the direct appeal and post-conviction proceedings were framed.

In his Motion, Kelley contended that the State's failure to disclose this evidence earlier is a violation

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[3] The supporting documentation attached to the May 10, 2006 letter reveals the initials of a fifth person who may have received some of the returned evidence. That person has not yet been identified by name.

of Brady - exactly the type of prosecutorial misconduct this Court said in Kelley v. State, 486 So. 2d at 582, likely would have caused a reversal of Kelley's conviction. [See R1 3-4]. It is fundamental error infecting the very core of the proceedings. The State had information about the disposition of physical evidence, but had suppressed that information despite a duty to disclose it. That decision to suppress left Kelley and his attorneys unable to look for, much less find, that physical evidence. Given the State's lack of disclosure, Kelley's attorneys proceeded to trial on the erroneous assumption that all of the crime scene evidence was destroyed. [See R1 1-4].

Kelley's Motion also asserted that the suppressed evidence underscored the error in the non-standard deadlock charge that was given to the jury when it reached an impasse. Instead of simply giving the standard charge, the trial judge added other admonitions to the jury, including this one: "There is no reason to believe there is any more evidence or clearer evidence could be produced on either side." See Kelley v. State, 486 So.2d at 584. We now know that significant other evidence is presumed to have existed that was not the subject of the court's destruction order.

The Motion asserted that the additional, non-standard deadlock charge was in fact false. See Giglio v. United States, 405 U.S. 150 (1972) (state's knowing presentation of or failure to correct false and material information at trial violates due process rights). [R1 at 21-22] . Had this jury not been improperly told that no more evidence ever could be produced, the Motion contended that Kelley's trial

could well have ended in an acquittal, or at least another impasse.

Kelley's Motion also noted that the State had an obligation to disclose the disposition of this evidence in 1966 and 1967 pursuant to the then-current version of Florida Rule of Criminal Procedure 3.220. [R1 at 24]. As the failure to disclose undermined any confidence in the verdict returned, the Motion asserted the State's violation of this rule was an independent basis for relief. It also infected the direct appeal and all post-conviction proceedings, and the completeness of the record developed in federal habeas proceedings. The State's suppression of evidence forced Kelley to assume incorrectly in his appellate and post-conviction proceedings that the evidence at issue had been destroyed.

The State filed its Response To Successive Motion For Postconviction Relief on May 29, 2007. [R2 181-226]. That Response focused almost entirely on Kelley's supposed lack of due diligence in bringing his Motion -- even though the State admitted that "the Florida Supreme Court no longer recognizes a 'due diligence' prong for substantive Brady claims" [R2 200] -- and on the substantive elements of Kelley's Brady claim.

The State relegated its entire response to Kelley's independent fundamental error claim regarding the State's duty to disclose under Florida Rule of Criminal Procedure 3.220 to footnote five on page twenty-four of its Response. [R2 204 n.5] The State asserted the violation of Florida Rule of Criminal Procedure 3.220 could not serve as a basis for relief because Kelley did not claim "surprise at trial" -- of

course, it would have been astonishing had he been able to express "surprise" about something he did not then know (i.e., that the prosecution had not fulfilled its discovery obligations) . [R2 204 N.5]

The State did not address Kelley's claim based upon Giglio v. United States, 405 U.S. 150 (1972), which was directed to the presumptively false and non-standard deadlock instruction that was given to the jury. The State did not address Kelley's claim of fundamental error. Nor did the State contend that it ever produced the Brady evidence at issue to Kelley before his trial.

In his September 18, 2007 Reply, Kelley pointed out that the State convicted him eighteen years after the crime occurred, on the basis of primary testimony from the immunized mastermind of the murder for hire (an admitted liar), and without ever accounting for what happened to all of the other crime scene evidence. Kelley pointed out that the State incontestably had withheld critical evidence, and, under the presumption of regularity of business practices, the evidence presumably existed at the time of Kelley's trial. [R2 253-82]. The State waited until 2006 to disclose this evidence to Kelley.

On December 20, 2007, the trial court entered an order denying Kelley's Motion for Postconviction Relief. [See R3 381-403]. This was a summary denial. Kelley had asked for an evidentiary hearing, but did not receive one.[4] This appeal followed. [R3 381]

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[4] That hearing would have involved, for example, an examination of evidence such as the handwritten list attached as Exhibit D to Kelley's Motion for Postconviction Relief that

Kelley has also filed contemporaneously with this appeal a Petition for Writ of Habeas Corpus. The Habeas Petition emphasizes that there has never been a factual determination that all fruits of the prosecution's crime scene investigation were destroyed prior to Kelley's trial in 1984. Yet, based upon a misapprehension of the record on appeal (left uncorrected by the State), this Court may have assumed that fact in deciding Kelley's direct appeal, see Kelley v. State, 486 So. 2d 578 (Fla. 1986), and said as much in Kelley v. State, 569 So. 2d 754 (Fla. 1990), which affirmed the denial of Kelley's first motion for postconviction relief. Although this appeal can correct this manifest injustice with the grant of a new trial or, at a minimum, an evidentiary hearing to determine what happened to the evidence, Kelley filed the Habeas Petition as a precautionary measure, in the case the Court concludes that relief on the specific ground raised there is dependent upon the factual record provided in the Appendix to that original proceeding.

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expressly lists Broward Coker, Robert McCoy, and Roma Trulock as potential witnesses. Undersigned counsel believes in good faith that this document came from the pre-trial files of the State Attorney's Office. Kelley believes it indicates actual knowledge, prior to Kelley's 1984 trial, by the State Attorney's Office, of the specific individuals to whom the evidence was returned in 1966 and 1967.

SUMMARY OF THE ARGUMENT

This Court has an awesome responsibility in any death penalty case, but it is especially awesome in this unusual case, where the conviction originally was upheld only with reservations and caveats that were prophetic. Kelley's first trial ended in a hung jury and mistrial. The second resulted in an impasse broken only by a non-standard and contested deadlock instruction. This Court declared it likely would have overturned the conviction if there had been even a "hint of prosecutorial misconduct."

Had it been known then that the State failed to disclose the crime scene evidence at issue in this appeal -- as is finally known now -- there can be no doubt the conviction would not have been upheld in the face of that "hint of prosecutorial misconduct." But, not only did the State not disclose that evidence to Kelley as it was obligated to do, it stood by and allowed this Court and other courts to proceed on the erroneous assumption that all of the crime scene evidence gathered by the State had been destroyed before Kelley's trial.

In fact, the State has never accounted for <u>that</u> evidence, and there never has been a factual determination that it was destroyed before the Kelley trial. That evidence accordingly is presumed under settled Florida law to have existed at the time of the Kelley trial. Had it been disclosed to Kelley, the trial would have been entirely different, the erroneous deadlock instruction never would have been given, and the outcome of the trial -- which already had reached an impasse -- almost certainly would have been different.

This Court was allowed by the State to proceed on an erroneous assumption. Now that the error has been disclosed, this Court should not hesitate to take the action it said it likely would have taken had there been a "hint of prosecutorial misconduct" in the case. It has taken years to uncover that prosecutorial misconduct, but that delay cannot alter the inexorable result of its discovery. That Judge Roettger correctly assessed Pickard's conduct in the Kelley prosecution has now been confirmed by the State's belated disclosure of other, incontestably material but suppressed evidence. That brings a new light to this Court's earlier recognition, on direct appeal in 1986, of the unusual facts of this case and its emphasis that "if even the slightest hint of prosecutorial misconduct was present in this case, the result might well have been different." Kelley, 486 So. 2d at 582. This conviction and death sentence must be overturned.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT KELLEY DID NOT ESTABLISH A BRADY v. MARYLAND CLAIM.

A. Standard of Review.

In reviewing the trial court's denial of the Brady claim made by Kelley, this Court gives deference to the trial court on questions of fact, but reviews de novo the application of the law and independently reviews the cumulative effect of the suppressed evidence. See Green v. State, 975 So. 2d 1090, 1101-02 (Fla. 2008), citing Mordenti v. State, 894 So. 2d 161, 168 (Fla. 2004); Way v. State, 760 So. 2d 903, 910 (Fla. 2000).

B. Kelley established that the State committed a Brady v. Maryland violation.

There are three components of a Brady violation: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In United States v. Bagley, 473 U.S. 667, 676 (1985), the United States Supreme Court disavowed any difference between exculpatory and impeachment evidence for Brady purposes.

1. The evidence was favorable to Kelley.

The trial court erred in concluding Kelley's current claim is a mere "variation of his previous challenges to the destruction of evidence." [R3 407]. To the contrary, this is a discrete Brady claim that

only was asserted when Kelley learned -- for the first time -- that the State had information about the location and disposition of over thirty pieces of physical evidence sent to the Florida Sheriff's Bureau Crime Laboratory in Tallahassee, but had suppressed that information and had never disclosed the existence of that other evidence prior to his 1984 trial.

As the extensive record in this case shows, that decision to suppress left Kelley and his attorneys unable to look for, much less find, that physical evidence. The argument of Assistant State Attorney Hardy Pickard, in January 1984 and prior to Mr. Kelley's first trial, confirms that the amount of evidence destroyed pursuant to the 1976 Order was minimal. When William Kunstler, Kelley's trial counsel, indicated confusion about the evidence, Pickard expressly limited the scope of the evidence that was destroyed pursuant to the 1976 Order:

> What actually happened is the only evidence that was destroyed was the State's exhibits that were introduced into evidence [at Mr. Sweet's trial]. There were some defense exhibits introduced into evidence in Mr. Sweet's trial which were not destroyed and are still in the Clerk's Office. There is a list of all the State's exhibits that were destroyed. I have a copy of it because I got it from the Clerk. It's in Mr. Sweet's file, it would not be in Mr. Kelley's file, the one that does exist.
>
> . . . .

> We do know what the evidence is. There is a complete list of the evidence in the Sweet file. The transcript of Mr. Sweet's trial reflects specifically what the items of evidence are. What we're talking about is ninety percent of it is documentary evidence; copies of checks, copies of rental car agreements, copies of motel registrations. There is very little actual physical evidence.

[R2 312-13; 333-34]. The pre-trial transcript shows that Judge E. Randolph Bentley understood the destroyed evidence was limited to that introduced in the Sweet trial. [R2 322; see generally R2 311-70].

There was no mention at that pre-trial hearing case that other physical evidence, not introduced at the Sweet trial, was also destroyed: The State never disclosed that other physical evidence had been returned to four public officers. Kunstler was candid that he did not know what evidence existed. The transcript shows that Judge Bentley did not make a finding that the other physical evidence from the crime scene investigation, not introduced at the Sweet trial, was destroyed.

Given the State's lack of disclosure, which it was obligated to make, Kelley's attorneys proceeded to trial on the false assumption that all evidence had been destroyed. The State left a defendant who consistently has maintained his actual innocence without critical information relating to the location and disposition of the physical evidence collected by the State from the crime scene and related locations. This newly disclosed prosecutorial misconduct denied

Kelley due process and provides the precise "hint" that this Court said would undermine the conviction.

There can be no doubt the evidence could have been both exculpatory of Kelley and impeaching of Sweet. With that crime scene evidence, Kelley's defense team would have shown the jury the sharp contrast between (i) the very bloody objects obtained at the crime scene, including the bloodied carpets and hallways runners and (ii) the absence of blood evidence connecting Kelley to the crime.

Sweet claimed the killers left the crime scene in the victim's car. [Kelley II 593-94]. Therefore, all evidence taken from the car, scrapings from the outside left car door, brake pedal, floor mat, car keys, metal door sill, left door window channel, tire and steering wheel should have yielded fingerprints, footprints, blood specimens or other specimens.

Deputy Murdock testified, however, that no blood whatever was found in Maxcy's car, [Kelley II 496-97], despite the absence of any evidence that the killer(s) had washed off blood before leaving Maxcy's house. [Kelley II 496]. In the light of Deputy Murdock's testimony, the suppressed evidence would have been exculpatory of Kelley and it would have provided a tangible, palpable way to impeach Sweet about his self-serving version of events, well beyond mere argument of counsel.

Simply put, physical evidence would have better allowed the jury to determine whether the arguments of counsel truly matched up with the crime scene evidence. The suppressed evidence would have been critically important in showing that Sweet was lying about how the crime unfolded. Even more

significantly, it would have allowed the jury to find there was "reasonable doubt" whether Kelley was involved in the crime. And, the incorrect deadlock charge would not have been given to the jury.

2. The evidence was suppressed by the State.

Kelley and his attorneys did not learn of the disposition of the evidence submitted to the Florida Sheriff's Bureau Crime Laboratory (now FDLE) until they received the May 10, 2006 letter disclosing this information for the first time. The State had the duty to disclose this evidence earlier, but did not do so. Even though Kelley specifically sought pre-trial exculpatory discovery from the State (but never received the specific documents at the center of this appeal or any information about the evidence to which they relate), see Kelley v. Singletary, 222 F. Supp. 2d at 1363, the State's duty to disclose would exist even if the defense had not made a specific request for the information. See Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); see also United States v. Bagley, 473 U.S. 667, 680-81 (1985).

As a constitutional imperative, the State cannot play hide-and-seek with such critical exculpatory and impeaching evidence. See Banks v. Dretke, 540 U.S. 668, 675-76 (2004) ("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process"); Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001) (ruling the argument that the defendant is required to figure out

the existence of exculpatory evidence "is flawed in light of Strickler and Kyles, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory.").

The presumption of regularity of business practices attaches in this case. See Robinson v. State, 325 So. 2d 427, 429 (Fla. 1st DCA 1976) ("where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and the courts presume that they have properly discharged their official duties"). Hence, it must be presumed that the evidence was in fact received by the officers of the submitting authorities when it was returned to them by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967. The May 10, 2006 letter in fact attached receipts.

There was no court order in place then (or ever) allowing for the destruction of the evidence returned to officials by the sheriff. Absent proof to the contrary, then, and there is none, the presumption must be conclusive that the evidence still existed in the hands of the submitting authorities at the time of Kelley's trial. Even though the State asserts it has now been destroyed, there still is no evidence that it was destroyed at the time of Kelley's trial.

Instead, the State simply points to affidavits submitted by Kelley's trial counsel in support of his motion for postconviction relief stating that the fruits of the police investigation had been destroyed. The statements were erroneously made. Indeed, there is no way Kelley's trial attorneys could have known that all evidence was destroyed -- only the State

would have knowledge of that. Moreover, there has never been an evidentiary finding that such is the case, and the State has never put forth any proof of such destruction, other than by pointing to these statements by Kelley's own attorneys in reliance on the State's non-disclosures.

In sum, it was the duty of the State to disclose to Kelley the fact that the four public officers received and presumptively maintained the evidence. See Rose v. State, 787 So. 2d 786, 796 (Fla. 2001) (ruling that even where prosecutor does not know of the exculpatory material, suppression may still occur if State's agents possess exculpatory or impeaching evidence). Only then could Kelley have taken advantage of it.

The State did not make that disclosure until decades later, on May 10, 2006.

3. Kelley was prejudiced by the State's suppression of evidence.

The test for measuring the effect of the failure to disclose exculpatory or impeaching evidence is whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. "Reasonable probability" is defined by this Court as "probability sufficient to undermine confidence in the outcome." White v. State, 664 So. 2d 242, 244 (Fla. 1995).

As this court explained in State v. Huggins, 788 So. 2d 238, 243 (Fla. 2001) (citing Strickler, 527 U.S. at 289-90 ("in reviewing the materiality of an alleged Brady violation and whether the third prong of

prejudice exists, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'"))

There are numerous reasons why the verdict in this case is not "worthy of confidence." First, this Court itself declared that even a "hint" of prosecutorial misconduct would have changed the confidence it placed in the verdict. Although affirming the conviction, the Court took pains to say: "[w]e wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 582.

Now, we know there is a "hint" -- even more than a "hint" -- of misconduct by a prosecutor caught in the same type of misconduct on prior occasions. Indeed, in granting federal habeas relief, Judge Roettger reviewed this record and concluded that "[t]his case presents many incidences of prosecutorial misconduct." Kelley v. Singletary, 222 F. Supp. 2d at 1363. The May 10, 2006 letter discloses yet another instance of prosecutorial misconduct -- in this case, one that hardly could be dismissed as immaterial to the outcome.

Second, the suppressed evidence underscores the error in the non-standard deadlock charge that was given to the jury when it reached an impasse. Instead of simply giving the standard charge, the trial judge added other admonitions to the jury, including this key directive: "There is no reason to believe there is

any more evidence or clearer evidence could be produced on either side."

We now know that significant other evidence indeed is presumed to have existed. Accordingly, not only was the additional, non-standard deadlock charge coercive in the first instance, it was in fact incorrect, and the State stood by and allowed the jury to be misled. Even apart from its duty to disclose this evidence to Kelley, the State had a duty of candor to the Court not to let the court give a jury charge the State knew was factually incorrect. Had this jury not been improperly told that no more evidence could be produced, Kelley's trial might well have ended in an acquittal or at least another impasse.

Third, as explained above, the defense was precluded from letting the jury see the bloody evidence taken from the crime scene and see the lack of blood on the evidence taken from the car. A reconstruction for the jury using actual evidence is worlds apart from being limited to counsel's argument based on the State's selective evidence. In a case where Kelley consistently has maintained his innocence and Sweet's account of the supposed murder was front and center at trial, the crime scene and related evidence could have persuaded the jury that Sweet was lying about Kelley, in order to save his own skin.

Finally, the suppression of the evidence about the disposition of this evidence precluded the defense from developing and presenting even more exculpatory evidence at trial. The May 10, 2006 disclosures establish that Exhibits three (3) through nine (9) were returned to Broward Coker. Those

exhibits included body hair samples and fingernail scrapings from Mr. Maxcy and wall scrapings from Mr. Maxcy's bedroom.

The State presented testimony that a violent struggle preceded Mr. Maxcy's death. [Kelley II 494]. Consequently, it is likely Maxcy's body hair samples might have been mixed with the hair of the victim's assailants, providing further identification of suspects while also indicating that Kelley was not present at the scene. The same is true of Mr. Maxcy's fingernail scrapings and the scrapings from the wall of Mr. Maxcy's bedroom.

The State's May 10, 2006 letter also discloses for the first time that the hallway carpet runners and the bedroom floor carpet section were returned to Mr. Coker. They could have yielded footprints or other evidence exculpatory as to Kelley, while identifying other suspects.

The suppression of evidence by the prosecution constitutes fundamental misconduct of the worst sort, directly affecting the trial and the subsequent appeal. Kelley and his attorneys were forced to assume that all of the evidence was destroyed by the time of trial, and they had to frame their arguments accordingly on direct appeal and in post-conviction proceedings. Had the State properly disclosed the disposition of the evidence at issue, Kelley would have either found the evidence and used it at trial, or Kelley could have presented appellate and post-conviction arguments as to the evidence in an accurate way.

As it was, this Court was allowed by the State to proceed under the false belief that all of the evidence

gathered by the State was destroyed under a court order that in fact only authorized limited destruction of evidence held by the clerk of the court from Sweet's trial. That requires this Court to step in and correct this injustice.

The ultimate test is not whether a different verdict would have been reached had the evidence (or evidence disposition forms) been disclosed timely, but whether suppression "undermine[s] confidence in the outcome." White, 664 So.2d at 244. That is, the test is whether the verdict is "worthy of confidence." Huggins, 788 So. 2d at 243. See Way, 760 So. 2d at 912; Young v. State, 739 So. 2d 553, 559 (Fla. 1999).

Here, there is certainly a reasonable question whether Kelley's trial might have reached a different outcome if the evidence had been available for trial preparation or at trial or even if only the forms themselves had been available at trial. Such reasons are undoubtedly why this Court announced on direct appeal that "[w]e wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 582. There was the issue of Sweet's credibility, the hung jury at the first trial, the impasse at the second trial that was broken only by a non-standard instruction, and the concerns of prosecutorial misconduct expressed by Judge Roettger and now confirmed by the State's belated disclosure of suppressed evidence.

Any confidence in the verdict has been significantly undermined, and Kelley has been deprived of due process. Kelley has established a

Brady claim, and the trial court erred in summarily ruling otherwise.

II. THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON KELLEY' S BRADY v. MARYLAND CLAIM.

A. Standard of Review.

A court's decision whether to grant an evidentiary hearing is subject to de novo review. Owen v. State, 2008 WL 1969141 at 2 (Fla. May 8, 2008) (citing State v. Coney, 845 So. 2d 120, 137 (Fla. 2003)).

B. Kelley should have been permitted an evidentiary hearing.

The trial court erred in denying Kelley an evidentiary hearing on his claim that the State withheld evidence in violation of Brady. The trial court should not have made "findings of fact" in its Order Denying Motion for Postconviction Relief, when Kelley was deprived of an evidentiary hearing on any factual issues contested by the State. [R3 403-10]

"Generally, a defendant is entitled to an evidentiary hearing unless the postconviction motion or any particular claim in the motion is legally insufficient or the allegations in the motion are conclusively refuted by the record." Nixon v. State, 932 So. 2d 1009, 1018 (Fla. 2006) (citing Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000)). "Additionally, where no evidentiary hearing has been held, an appellate court must accept the defendant's factual allegations as true to the extent that such allegations are not refuted by the record." Nixon, 932

So. 2d at 1018 (citing Peede v. State, 748 So. 2d 253, 257 (Fla. 1999)).

Because the factual basis for this Brady claim is unknown suppression of evidence, Kelley has not been able to raise a claim for prosecutorial misconduct until that disclosure finally was made to him by the May 10, 2006 letter from the State. Kelley is entitled to an evidentiary hearing on his Brady claim for this reason alone. The trial court erred in refusing him that process.

Furthermore, if Kelley had been provided an evidentiary hearing, he would have called certified crime scene reconstructionist Ross Gardner as a witness. Gardner would have testified that Kelley's defense team could have shown the jury the sharp contrast between (i) the very bloody objects obtained at the crime scene, including the bloodied carpets and hallway runners, and (ii) the absence of blood evidence connecting Kelley to the crime. As Gardner stated in his affidavit, a picture is worth a thousand words. [R1 34]. The physical evidence would have better allowed the jury to determine whether the arguments of counsel truly matched up with the crime scene evidence.

At an evidentiary hearing, Kelley also would have established that he had no prior knowledge of the disposition of evidence form. His former counsel during his federal habeas proceedings, James C. Lohman, would have testified he is certain he never saw the disposition-of-evidence records at issue in this appeal. [R1 49]. Likewise, paralegal Samantha Leone would have testified that in organizing and maintaining this voluminous case file on behalf of

Kelley's undersigned counsel, she is certain she has never seen the disposition-of-evidence records prior to receiving and reviewing the May 10th letter from Victoria Avalon. [R1 51-52].

Kelley also could have called officials of the FDLE to confirm the chain of custody of the physical evidence at issue, and to describe any efforts made to determine if it existed in 1984. Kelley also could have called former Assistant State Attorney Hardy Pickard to testify as to the evidence destroyed pursuant to the 1976 Order.

More specifically, in his September 18, 2007 Reply to the State's opposition to his Motion for Postconviction Relief, Kelley twice emphasized that there had never been a factual determination by a trial court that all of the fruits of the prosecution's investigation of the crime scene were destroyed prior to Kelley's trial. To be sure, as the trial court noted in footnote 2 of its Order, it had made a determination in 2006 that, as of that time, "no evidence remained in existence." [R3 404]. The court, however, ignored the critical distinction that no trial court ever determined that all evidence had been destroyed prior to Kelley's trial in 1984.

In fact, the 1976 Order authorizing the destruction of evidence from Sweet's trial makes it clear that only evidence from that trial was addressed there. In that order, the Highlands County Circuit Court authorized and directed the Clerk to "dispose of evidence in the above styled cause [State of Florida v. Sweet, Case No. 3002]." [R2 305]. There simply is no hint that the evidence returned to the submitting authorities were introduced as evidence

in the Sweet trial. Not even the State has suggested, nor could it, that the returned evidence was destroyed pursuant to the 1976 Order, which did not authorize any such destruction because the returned evidence was not in the possession of the Clerk. The State simply says, without explanation, that this evidence has been destroyed.

But, the fact remains, those items indisputably were not used as evidence in the Sweet trial, and hence the 1976 Order, on its face, did not authorize their destruction. Presumably the State only destroyed evidence it was authorized to destroy.

There was no mention in 1984 prior to Kelley's trial that other physical evidence, not introduced at the Sweet trial, was also destroyed. Thus, Judge Bentley could not have made a finding that the other physical evidence covered by the withheld evidence disposition forms was destroyed.

Nor could this Court have made such an evidentiary finding in the first instance. Yet, that awful result inadvertently occurred based on the honest mistake of Kelley's counsel that the State allowed to stand uncorrected: this Court appears to have assumed that all evidence was destroyed pursuant to the 1976 Order. That was simply an assumption and was not supported by any competent evidence, much less any finding by the trial court.

And, that erroneous assumption has been repeated over the years. It has become a self-perpetuating error and the State let it stand, despite knowing otherwise until finally admitting its existence in May 2006. In its Order, the trial court pointed to Florida Supreme Court opinions to justify

its conclusion that a finding has been made that the evidence at issue was destroyed prior to 1984. [R3 406-07]. But that evidentiary finding has never been made by a trial court, and this Court's assumptions are now shown by the State's belated disclosure to have been unwarranted.

CONCLUSION

To sum up: Kelley argued to the trial court that the presumption of regularity attaches and it should now be presumed that the fruits of the prosecution's investigation of the crime scene existed at the time of his trial. Based upon a violation of Brady, his conviction should be reversed and his sentence vacated.

The trial court thus erred in not finding that Kelley established a prima facie Brady claim. At the very least, the trial court should have conducted an evidentiary hearing to determine the factual circumstances surrounding the destruction of all the evidence. It erred in not doing so.

The trial court's order should be reversed.

Dated: June 9, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant William H. Kelley has been furnished by Federal Express to the following persons on this 9th day of June 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this Petition is 12-point Courier New, and that this Petition fully complies with the requirements of Florida Rules of Appellate Procedure 9.142 and 9.210.

_____
Sylvia H. Walbolt